

In the Matter of Merchant Mariner's Document No. Z-684864 and all other Seaman Documents
Issued to: Louis Rivera

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1168

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 13 March 1959, an Examiner of the United States Coast Guard at New York, New York revoked Appellant's seaman documents upon finding him guilty of misconduct. The single specification alleges that while serving as bedroom steward on board the United States SS CONSTITUTION under authority of the document above described, on or about 6 May 1958, Appellant wrongfully molested a female passenger, Pamela Scholtz, age 11, by kissing her and placing his hands upon her person.

At the beginning of the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by counsel of his own choice. He entered a plea of not guilty to the charge and specification.

The Investigating Officer made an opening statement and introduced in evidence the depositions of the complaining witness, Pamela Scholtz, and her father, Edward Scholtz, and an entry from the Official Logbook of the Constitution.

In defense, Appellant offered in evidence the testimony of two crew members, Rafael Ruiz and Luis Arroyo, and by stipulation a statement by a third crew member, Ralph Ibrahim. The Appellant also testified in his behalf.

At the conclusion of the hearing, the oral arguments of the Investigating Officer and Appellant's counsel were heard and both parties were given an opportunity to submit proposed findings and conclusions. The Examiner advised the Appellant of his decision in which he concluded that the charge had been proved and that the specification had been proved, in part, as to the kissing. An order was entered revoking all documents issued to Appellant. From that order this appeal was filed on 17 March 1959.

FINDINGS OF FACT

On 6 May 1958, Appellant was serving as bedroom steward on board the United States SS CONSTITUTION and acting under authority of his Merchant Mariner's Document No. Z-684864 while the ship was

at sea enroute to New York, having departed Genoa, Italy on 4 May 1958.

Pamela Scholtz was a female passenger, eleven years of age, aboard the SS CONSTITUTION, with her father, mother, and three-year- old brother. They had boarded the vessel at Genoa, Italy on 4 May 1958. Appellant was assigned as bedroom steward for the room occupied by Pamela and her family.

On the evening of 4 May, the Appellant delivered some fruit to the Scholtz state room. Pamela thanked him for doing so and kissed him on the cheek. Her parents were not present when this happened. Later that same day Pamela reported to her father that the Appellant had been kissing her.

When he received this report from his daughter, Mr Scholtz reassured her and told her to tell Appellant not to kiss her and to just be friendly. The following day, 5 May, Pamela reported to her father that everything was fine between her and Appellant and that her parents didn't have to worry any more. She reported that she had asked the Appellant to please leave her alone and to just be friends.

On the morning of 6 May, Appellant was working on deck when Pamela asked him to get her some comic books. Appellant said he was busy but would get them later. Pamela then kissed him on the cheek and walked away. During the period of 4 to 6 May Pamela Kissed the Appellant on at least one other occasion.

On the evening of 6 May, Appellant delivered the comic books to the Scholtz stateroom. Pamela and her brother were in the stateroom. Her parents were at dinner. Appellant was working in the room while Pamela, her brother, and two boys from across the passageway were playing in and out of the room. During the evening Mr. Scholtz entered the room while Appellant was still there. His daughter appeared frightened and asked him to stay in the room. Mr. Scholtz left momentarily and then returned. After his return his daughter told him that the Appellant had kissed her again and had put his head under her pajama top, had hugged her and asked her why she didn't want to make love with him.

At noon the following day, 7 May, Mr. Scholtz reported these incidents to the ship's officers. Mr. Scholtz did not speak to Appellant himself concerning this matter nor did either he or his daughter identify the Appellant in person.

Appellant has no prior record with the Coast Guard in fifteen years of service at sea.

BASES OF APPEAL

In his appeal from the order of the Examiner the Appellant contends that:

Point I. The Examiner erred in accepting the testimony of complainant's father as to the details of the alleged incidents as substantive evidence of the facts and as corroborating his daughter's testimony.

Point II. The decision of the Examiner is not supported by substantial evidence of a reliable and probative nature. Appellant urges that the testimony of Mr. Scholtz is improbable, conflicts with that of the complainant and is contrary to human nature. Also the testimony of Pamela is contradictory, inconsistent, and contrary to human nature. Appellant also urges that the Examiner failed to properly consider the defense evidence.

Appearance: Zwerling and Zwerling of New York City by Irving Zwerling, Esquire, of Counsel.

OPINION

The specification preferred against Appellant was found proved in part only. The Examiner did not find proved the allegation that Appellant placed his hands on Pamela's person since there was no corroboration of her testimony as to this act and in fact there was a material variance between her testimony and that of her father. In finding the remainder of the specification proved the Examiner noted that it was supported by the testimony of Pamela's father as to the details of the incidents. It is apparent from this that the Examiner felt that in this case such corroboration of the complainant's testimony was necessary. I agree.

In his appeal the Appellant contends that the Examiner's reliance on the testimony of Pamela's father to supply this corroboration as to the details of the incidents was erroneous. The Examiner cited Appeal No. 1052 as authority for accepting this testimony as an exception to the hearsay rule. The Appellant contends that this case stands for just the opposite proposition. I agree with Appellant. The testimony of Mr. Scholtz as to the details of the incidents adds nothing to the weight of Pamela's testimony concerning them. Such evidence is strictly hearsay and should not have been considered as reliable evidence corroborating Pamela's testimony. However the testimony by Mr. Scholtz that Pamela made two complaints to him is admissible as a recognized exception to the hearsay rule.

When this testimony of the father is rejected it leaves in the record only the testimony of Pamela to the incidents, the fact of her complaints to her father and his testimony as to her frightened appearance and her request that he not leave the room. This would ordinarily be sufficient since corroboration is not essential in such cases and is indeed rarely available. But in this case I believe, as the Examiner apparently did, that some corroboration is necessary. An examination of the testimony, however, reveals conflict rather than corroboration. Even after discounting for the lapse of time before the testimony was given, the age of the complainant and the subject matter of the

inquiry, substantial conflicts and inconsistencies still remain. For instance Pamela testified that the Appellant did nothing unusual the first day, 4 May, that he kissed her on the second day, 5 May, but she did not tell her father of it, that he thereafter kissed her a lot and that she then told her father. This would have apparently been on the third day, 6 May. She also testified that the Appellant put his hand up her shirt and wanted to help her undress and that he only did this type of thing once. On the other hand her father was quite definite that she reported to him on the first day, 4 May, that Appellant had kissed her and that he received no report of his kissing her on the second day, 5 May, but rather that everything was fine between them. He also testified that Pamela reported that Appellant put his head under her pajama top and that he touched her genital area and that he was continually following her around and putting his arms around her. I find it difficult to reconcile these and the other variances in the testimony of the complainant and her father. To the extent that they differ I have accepted the testimony of the father as to those facts which were within his personal knowledge.

An analysis of Pamela's testimony shows several inconsistencies that are difficult to explain. For instance the Appellant testified that on 6 May Pamela kissed him while he was on deck. Two witnesses support his testimony though they did not identify Pamela. This incident must have happened after her first complaint to her father. It is difficult to believe that she would do such a thing if Appellant had indeed been kissing her in the objectionable manner she described. But that she probably did do this, despite her denial, is further supported by her own admission that she kissed Appellant not over three times and that one of these times could have been after the first time Appellant kissed her. Further she testified that on that same night she made an attempt to be out of her room when Appellant was due to come to make up the beds because she was afraid of him. This is difficult to reconcile with her action of kissing Appellant that same day or with her report to her father the previous day that everything was fine between her and Appellant. It is also difficult to reconcile her testimony that she tried to stay out of the room about the time she knew Appellant usually came in, with the fact that on the night of 6 May she was in the room when Appellant entered. Also if she were afraid of Appellant and tried to avoid him why did she not tell this to her father?

The following facts have also influenced my decision: Pamela's younger brother was in the room with her at the times these alleged incidents occurred; on the night of 6 May the two boys from across the passageway were also running in and out of the room until Appellant told them to go to bed; the conversations Pamela reported as having occurred between her and Appellant do not sound realistic; when Mr. Scholtz entered the room on 6 May there was no indication of any reaction on the part of the younger brother to the reported actions of the Appellant; Pamela admitted kissing the Appellant between one and three times but did not tell her father of this.

An analysis of the record shows that practically every statement made by the Appellant is corroborated by the testimony of Pamela, her father, or one of the three defense witnesses, and as to some points by both defense and government witnesses. Practically the only statements of his which are not supported are his denials that he kissed or touched Pamela. On the other hand, Pamela's statements as to Appellant kissing her are also not supported. Additionally many of her other statements are disputed by her father, Appellant, and the defense witnesses. In sum, Appellant's

version of the incidents is supported to a much greater degree than is the complainant's. It should be noted that the testimony of the complainant and her father was given by deposition and thus the Examiner did not have an opportunity to observe these witnesses and judge their credibility in comparison with that of Appellant.

While ordinarily the statements of the complainant plus the evidence of her complaints and her frightened appearance would constitute substantial evidence to support the findings without other corroboration, in this case, not only is there no other corroboration but rather just the opposite. When I consider this fact in conjunction with the age of the complainant, the inconsistencies in her testimony, the improbabilities inherent in her evidence, and the substantial corroboration of the Appellant's testimony, I have considerable doubt that the evidence is sufficient to support the findings of the Examiner. I believe this doubt should be resolved in favor of the Appellant. Therefore, the finding that the specification was proved in part is reversed; the charge and specification are dismissed.

The record here shows that the complainant was present during the taking of the deposition of her father, that her deposition was taken immediately thereafter, and that her parents were present during her direct examination. Counsel for the Appellant requested that the parents be excluded during his cross-examination of Pamela. This was complied with. It is not possible to tell from the record to what extent, if any, the testimony of Pamela was affected by her hearing the evidence given by her father or by the fact that her parents were present during her direct examination. In any event this procedure should not be followed in the future. The witnesses should be examined separately in accordance with well-established custom.

ORDER

The Order of the Examiner dated at New York, New York, on 13 March 1959 is VACATED and SET ASIDE.

J.A. HIRSHFIELD
Rear Admiral, United States Coast Guard
Acting Commandant

Date at Washington, D.C., this 17th day of May 1960.